

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7531

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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VINCENT J. BELLOWS,

Plaintiff-Appellee,

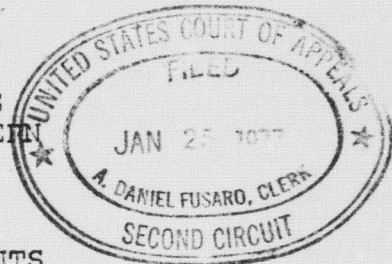
-against-

DENNIS DAINACK and
BRIAN VAN HOUTEN,

Defendants-Appellants.
-----x

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS



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UNITED STATES COURT OF APPEALS
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VINCENT J. BELLOWS,

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Plaintiff-Appellee,

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-against-

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Docket No.
76-7531

DENNIS DAINACK and
BRIAN VAN HOUTEN,

:

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Defendants-Appellants.

:

-----x

BRIEF FOR DEFENDANTS-APPELLANTS

Statement of the Case

This is an appeal from a judgment of the District Court for the Southern District of New York (Hon. Morris E. Lasker, D.J.) entered on September 22, 1976.

The issues were tried before the Court and a Jury. The Court submitted questions to the jury and it was found that the defendants had no reasonable cause to believe that the plaintiff was publicly intoxicated in their presence on the evening of July 16, 1972, and the defendants had applied physical "force" to the plaintiff to force him into the police car and defendant Dainack had applied "force" to plaintiff within the police car.

The jury returned a verdict in favor of the plaintiff against the defendants Dennis Dainack and Brian Van Houten in a total amount of \$12,000 compensatory damages, and against the defendant Dennis Dainack in the amount of \$3,000 for punitive damages and against the defendant Brian Van Houten in the amount of \$2,000 for punitive damages.

The defendants thereafter moved to set aside the verdict and/or for a reduction of the amount of damages awarded by the jury. The Court granted a new trial unless plaintiff accepted a reduction of damages to \$4,000 against the defendants for compensatory damages; however, for punitive damages in the amount of \$3,000 against the defendant Dennis Dainack, and in the amount of \$2,000 against the defendant Brian Van Houten remained unchanged. Plaintiff accepted and judgment was entered accordingly. This appeal was then taken.

Questions Presented

1. Did the plaintiff's prima facie case or evidence demonstrate the alleged torts were properly a federal civil rights action?

2. Was the admission of irrelevant and prejudicial testimony so improper as to warrant a new trial?

3. Was the trial court's charge legally inadequate and erroneous as to vital points of law?

4. Did the summation of plaintiff's counsel so exceed the proper limits as to mandate a new trial?

5. Considering questions 1, 2, and 3 together should a new trial be granted?

6. Should this Court further reduce compensatory damages and set aside the award of punitive damages?

Facts

A firemen's carnival was held on July 16, 1972 in Livingston Manor, Sullivan County, in the State of New York (T12).^{*} Plaintiff Vincent Bellows visited the event from noon until two o'clock in the afternoon partaking of six beers during that time (T14, T28). Thereafter, he moved on to the local tavern remaining there until six o'clock. He had twelve beers there (T14, T31). Returning home for dinner, it was at nine o'clock that plaintiff returned to

^{*} Numbers in parentheses followed by "A" refer to Vol. 1 of the Joint Appendix, if preceded by "T" refers to Vol. 2, the Trial Transcript.

the carnival consuming an additional six beers by eleven o'clock when he set out on foot for his home (T14, T34).

On the way home he met up with an acquaintance Eddie "Johnson" (T36). Together they came upon Homer Salsbury at a local public phone booth. Plaintiff and his companion "hassled" Salsbury and trapped him inside of the phone booth (T73, T75). Salsbury called the police (T77).

Meanwhile, the defendants Dennis Dainack and Brian Van Houten, having begun their patrol, were summoned to the phone booth (T96, T97).^{*} Upon arrival they were told by Homer Salsbury that he had been assaulted by two men (T99), one of whom was still there and he pointed to the plaintiff sitting nearby (T100). Defendant Dainack motioned to the plaintiff and plaintiff walked to the police car (T101), giving his name (T103). Defendants then became otherwise engaged. Plaintiff then left the scene and walked home (T41).

Completing the matter with Salsbury (T103) the defendants resumed their patrol, stopping by the carnival site and returning through town (T167) when defendant Dainack noticed plaintiff sitting on the stoop of a local hardware store with two other men.

^{*} The defendants had the responsibility to patrol the upper half of Sullivan County, a range of 40 to 50 miles (T94). Judicial notice can be taken that the County has 980 square miles (1976 World Almanac, p. 250) and is a noted resort area, especially in the summer.

Dainack got out of the car and engaged plaintiff in conversation (T104, T168). Bellows smelled of alcohol, and red eyes, slurred speech and was belligerent (T104, T105, T171). When asked for identification, plaintiff only gave his name (T46, T104, T169). As the conversation grew louder (T168), the two men with the plaintiff stood up (T105, T168). At which point Van Houten, sensing a confrontation, got out of the car and joined his partner (T105, T168).

The plaintiff was placed under arrest for public intoxication (T116) and assisted to his feet. He voluntarily entered the patrol car (T169, T105). The patrol car drove off. A check was run for outstanding warrants (T170). Plaintiff became less belligerent and more cooperative; identifying himself as a local resident (T106, T170). And plaintiff began to cry (T106, T170). The defendants - police officers having received another call to respond to, decided that the plaintiff was no longer dangerous, released Bellows (T173, T106).

In all, plaintiff had been detained for ten (10) minutes (T53). Plaintiff testified that "force" was used when taken into custody and at one time while he was sitting

alone in the back seat of the police car (T16, T19).
Plaintiff denied he cried and offered "proof" that he would
not cry when taken into police custody.*

Opinion Below

Upon the defendants' motion to set aside the
verdict of the jury, or to grant a new trial, or in the
alternative to set aside or reduce the verdict of the jury
as excessive, the Court in reducing the award of damages
decided to reduce only compensatory damages but not set
aside the verdict (85a-91a).

POINT I

THE ALLEGED EXCESSIVE USE OF FORCE
IN THE ARREST WHICH CONSTITUTES
THE BASIS FOR THE ACTION WAS SIMPLY
A TORT TO BE THE SUBJECT OF STATE
COURT ACTION AND WAS NOT PROPERLY
THE BASIS FOR A FEDERAL CIVIL
RIGHTS ACTION IN THE DISTRICT COURT.

This case is illustrative of a growing number of
actions being instituted in the district court for simple
torts that, if actionable, should be the subject of state
court action and is without the jurisdiction of the district

* The extraneous matter of plaintiff's prior contacts
with other State Policemen was allowed as "tending" to
establish plaintiff had become hardened as to being
arrested.

court. A policeman is alleged to have used excessive force in making an improper arrest of a person who appeared to be under the influence of alcohol - a frequent allegation in the day-to-day police activities in New York, as in the other states of the union. The evidence of plaintiff, even if credited, failed to show the degree of excessive force as to justify any finding of civil rights violation. Johnson v. Glick, 481 F. 2d 1028 (2d Cir., 1973), cert. den. 414 U.S. 1033 (1973). Indeed, the State Police reviewed the complaint against these state policemen (T159). There is no proof that the defendants participated in any scheme to deprive plaintiffs of their civil rights.

We moved to dismiss at the end of the plaintiffs' case upon this ground that the action was not one for the federal court (T90-91) and renewed such motion at the end of the whole case (T334).

We submit that this case is governed by Paul v. Davis, ___ U.S. ___ 47 L. Ed. 2d 405 (1976). In that case the majority opinion by Justice Rehnquist quoted from Screws v. United States, 325 U.S. 91, 109 that "Congress

should not be understood to have attempted 'to make all torts of state officials federal crimes...[only]...those acts which deprived a person of some rights secured by the Constitution or laws of the United States" and distinguished Monroe v. Pape, 365 U.S. 167 (1961) as a specific Fourth Amendment violation case.

The opinion in Paul v. Davis goes on with language fully appropriate here that "such a reading [as was done here by the trial judge] would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." 47 L. Ed 2d, at 413.

There is no doubt that the trial judge simply imposed state tort law as the basis of federal civil rights jurisdiction. See infra Point IV. The jury simply received a case that was outside the jurisdiction of the federal courts. The plaintiff's prima facie case, at most, showed a use of "force" during an arrest. Given the highly significant facts that plaintiff's own witness David Miller testified plaintiff was drinking and it was noticeable (T75), the lack of any injury to plaintiff from the arrest

or force, the trial court should have granted defendants' motion to dismiss under the authority of Paul v. Davis, supra and Johnson v. Glick, supra at 1033. Certainly, the trial court never properly instructed the jury on the requisite elements of "force" which amounts to a violation of a person's civil rights.*

There was no basis to send this case to the jury as the testimony of plaintiff and his friend David Miller simply showed a state law tort beyond the District Court's jurisdiction. Indeed this incident was so de minimis as not to warrant the upholding of the judgment. Now, after trial, with all the evidence in, the complaint should be dismissed.

POINT II

A NEW TRIAL SHOULD BE GRANTED
BECAUSE OF A SERIES OF HIGHLY
PREJUDICIAL ERRORS DURING THE
COURSE OF TRIAL WHICH DEPRIVED
DEFENDANTS OF A FAIR TRIAL.

There can be no doubt that the defendants were severely prejudiced by a series of highly prejudicial rulings by the trial judge which ultimately allowed the plaintiff to spread on the record an irrelevant record of

* The trial court's "questions" (T320) clearly required the jury to use a state law standard ("applied physical force").

alleged state police harassment (T222-T236; T238-241). Even when the trial court attempted to limit the scope of plaintiff's testimony as to "crying" the court ended up somehow overruling defense counsel. Thus, as prior charges, on plaintiff's counsel question of his client (T232):

"Q Even after this case was brought, here in the Federal Court --

THE COURT: Nothing after this case was brought.

MR. ROSEN: There is still another one.

THE COURT: But we are limiting this to material to the plausibility of whether he cried, and what happened after this case will be irrelevant.

MR. GREENWALD: I want to note there has been no mention of crying.

THE COURT: Mr. Greenwald, would you please keep quiet? You have made an objection on this point five times and I have overruled you."

There can be no doubt the trial judge was prejudicing the defendants in the eyes of the jury.

The evidence of prior history was the basis of plaintiff's counsel highly inflammatory and grossly improper summation (Point III, infra) and the charge of the court utterly failed to correct the matter, having the jury free to express its passions by the grossly excessive award including unreduced punitive damages.

The inquiry by appellee's counsel with respect to the appellants' knowledge of the appellee's prior relations with the State Troopers was initially ruled relevant only as to the issue of punitive damages (T121). Limiting instructions were supposed to be given to the jury but never were. Appellant Dainack's negative response to the question "Did you ever hear the name of Vincent Bellows at the state police barracks, whether you knew him or not?" should have foreclosed any further discussion of the matter. Still, over objection, appellee's counsel continued to spread a whole history of appellee's prior arrests and contacts with state troopers other than the appellants before the jury (T122, T123) until stopped by the trial judge (T125). Yet, the Court failed to admonish the jury with respect to the liberties taken by the appellee. The prejudice started at this point.

However, appellee's counsel would not be deterred and managed to circumvent the above ruling of the Court. On rebuttal the Court allowed such testimony on the issue of whether the appellee would have broken down and cried in the police car. In an astounding ruling, the numerous unrelated arrests and acquittals were to be placed in evidence as relevant to the issue of whether plaintiff was a "cry-baby" (T223-T236).

Assuming, arguendo, the limited relevance of the admitted testimony, the Court failed to consider the proscription of Rule 403 of the Federal Rules of Evidence providing that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." The admission of this testimony created an undeniable risk that the decision of the jury would find support in an improper basis; a purely emotional one. The prejudice was compounded by appellee's counsel improper use of the admitted evidence in his summation (See Point I, supra), and the inability of the jury to limit its use of the evidence to the purpose for which it was admitted is apparent from the excessive verdict. (See Point V, infra).

It cannot be denied evidence relevant to the credibility of a given witness may be properly placed before the jury. But, in the instant case, the issue of appellee's behavior was not relevant to issues which were outcome determinative.* Certainly, sufficient testimony was before the jury to enable it to judge the credibility of the appellee without the need to admit testimony intended to depict the appellants' activities of July 16, 1972 as part of some vast conspiracy to deprive plaintiff of his constitutional rights.

Certainly, whether one has had prior contacts with the police is highly irrelevant but also highly prejudicial in the instant case. The tenuous basis for the admission of the evidence is clear. The prejudice obvious. Here was extraneous matter being ultimately used in plaintiff's summation in a manner to connect defendants to prior incidents (T300-T301).

No amount of instruction, and none was given, could erase the severe prejudice to the appellants. The court's failure to remind the jury of the limited purpose for which the aforementioned testimony was admitted further deprived the appellants of a fair trial. The denial of same warrants reversal and the granting of a new trial.

* Why the appellants released the appellee was simply an issue which had been raised and disputed in the course of the trial (T312), not an issue upon which the verdict would necessarily be based.

POINT III

THE SUMMATION OF APPELLEE'S
COUNSEL, INTENDED TO AROUSE
UNDUE PASSION AND PREJUDICE
ON THE PART OF THE JURY, SO
EXCEEDED THE BOUNDS OF
PROPRIETY AS TO MANDATE A
NEW TRIAL.

In this Circuit the rule is that

".... Improper or intemperate
argument by counsel in summation
may necessitate a new trial where
it tends to arouse undue passion
or prejudice on the part of the
jury, thereby depriving the
opposite party of a fair trial...."
(Citations omitted). Mileski v.
Long Island Railroad Company,
499 F. 2d 1169, 1171 (2d Cir. 1974).

and while this Court affirmed the judgment in Mileski
the totality of the circumstances in the instant case, as
elaborated herein, reveal that the number and gravity of
improprieties present in appellee's counsel's summation
deprived the appellants of a fair trial.

A. It Was Improper and Inherently Prejudicial
for Appellee's Counsel to Give His Personal
Opinion of the Credibility of a Witness

In Compagnie National Air France v. New York Port
of Authority, 427 F. 2d 951 (2d Cir. 1970) in response to
counsel's comment on the testimony of a key witness: "I say
that when this man took the stand and said he didn't have
knowledge of this notorious situation *** he was a liar, he
was a cheat, and he was a perjurer.", the court stated that

"While counsel may stress
inconsistencies in testimony by
opposing witnesses, he is not to
give his personal opinion of the
credibility of a witness."*
Compagnie National Air France,
supra, at 956.

The summation indicates clearly appellee's counsel's
personal opinion of the credibility of the appellants as
witnesses.

"These officers-- and you must
understand this, I am not naive --
if you say to an officer, did you hit

* Although finding that counsel's comments came perilously
close to violating this rule, the court was unwilling to
say that these or similar remarks were sufficiently
prejudicial to warrant reversal.
Appellants' reliance on Compagnie is not misplaced. Sub-
section A herein deals with one of many improprieties in
the summation. And the excessive verdict returned by the
jury demonstrates sufficient prejudice to warrant reversal.

the defendant in a police car, do you think for a moment he is going to say yes, I did? For one single instant? Of course not." (T281).

The necessary implication of counsel's statement is clear. He asserted that the defendants were incapable of relating the truth; truth being that which appellee's counsel says it is. Thus, a denial, as well as an admission, produces a condemning conclusion. Would not the appellants have best remained silent in view of such improper and prejudicial commentary?

Yet, appellee's counsel did not stop at innuendo. Counsel's remarks left no room for a determination on the jury's part as to the issue of credibility, declaring

"Let me show you something about false testimony." (T285).

and

"You know, this is the point we say, we go before a jury and we tell them the truth. It is better to tell an incredible lie or an incredible situation like this?" (T295).

According to appellee's counsel, the appellee has been most truthful, but the defense has offered only false testimony and incredible lies.

Yet, the most bold, intemperate and prejudicial commentary of all

"You know, I remembered the cliché that they said to me in school when I was younger, 'Lied like a trooper.' I never thought I would come in contact with it in this case, how apropos that is here." (T295).

undeniably flies in the face of settled law and the established standards of ethical conduct.*

* "EC 7-24. In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact...." (Emphasis added)

"DR 7-106. Trial Conduct

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

- (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." (Emphasis added). New York Judiciary Law, Code of Professional Responsibility (McKinney 1975).

Appellee's counsel's conduct cited above and that which is to be cited below inflamed the jury rendering them incapable of returning a rational decision.

B. It Was Improper and Inherently Prejudicial for Appellee's Counsel to Appeal to the Jury to Put Themselves in Appellee's Place

An appeal to the jury to put themselves in plaintiff's place is improper and warrants reversal.

"One doing that would be no fairer judge of the case than would the plaintiff [him]self. *** Sympathy for suffering and indignation at wrong are worthy sentiments, but they are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. In judicial inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law."
Klotz v. Sears Roebuck & Co., 267 F. 2d 53, 55 (7th Cir. 1959); cert. denied 361 U.S. 877.

Appellee's counsel cannot deny that he indulged in the kind of appeal specifically condemned.

"Now, I will put it to you very plainly. Which one of you would like to be grabbed at night and taken in a police car on a dark road, not knowing what is going to happen, even if you are brought back in five or ten minutes, leaving your friends in the street to wonder what is going to happen? How would you like it? How would you like a member of your family to be in that spot?

"So when you talk about good faith, we let him go right away, my God, how much is just five minutes of your time?" (T290).

These remarks made by the appellee's counsel were in effect pleas that the jury permit sympathy rather, than the facts in evidence to determine the issues, and appellee's counsel was guilty of this impropriety not once, but twice. For he did make a second appeal designed to arouse undue passion and prejudice toward the appellants.

"And how would you judge it? In your own common sense, what would you want? Would you care for \$5 or \$10? You have a right to give even a dollar. But it is not for ten minutes, it is the life of the situation. The actual life of an individual to be free. Because if you are not free, you might as well be in a police state, and that is what we are." (T297, T298).

The nature of the remarks, their number in repetition, when considered with the record as a whole, evidences a deliberate appeal to the jury to substitute sympathy for judgment (Klotz, supra, at 55), and worked to deprive the appellants of a fair trial.

- C. It Was Improper and Inherently Prejudicial for Appellee's Counsel to Characterize the Testimony of the Appellants in a Manner Wholly Unjustified by Anything in the Record and to Refer Continually to Matters Which Were Not in the Record and Which Were Not Relevant
-

Koufakis v. Carvel, 425 F. 2d 892, 900-905 (2d Cir. 1970)* epitomizes the case in which counsel repeatedly ventures beyond the bounds of propriety.

The summation of appellee's counsel closely parallels the wrongful conduct illustrated and condemned in Koufakis. There this Court found prejudice inherent in counsel's improper conduct in characterizing the testimony of witnesses in a manner wholly unjustified by anything in the record and by continually referring to matters which were not in the record

* The court stated it was of the opinion that even absent any objections that a new trial should have been granted in this case (at 900).

and which were not relevant.*

"Logically, later they come, they grab a hold of him. They both admit they helped him. That is a police statement. We helped him. If we bang him over the head, we help him. They never used any force in this case, it is absolutely unheard of, it is a figment of the imagination of Vincent Bellows." (T232, T283).

Appellants' answers does not grant to plaintiff's counsel license to interpret that as an admission of violent conduct. Such characterization is unsupported in the record as a whole and further depicts the continued course of prejudicial commentary indulged in by appellee's counsel.

Prior to the commencement of the summation, counsel for plaintiff was specifically admonished by the court.

"THE COURT: Mr. Rosen, you understand I am not going to let you talk to the jury about a pattern of behavior by the state troopers, because there is no testimony in the record, no evidence to show that the defendants did know Bellows before." (T245).

* The summation by appellee's counsel in this regard constituted unsworn testimony not subject to cross-examination. Evidence possessed by an attorney, if admissible, should be presented only as sworn testimony. EC 7-24, Code of Professional Responsibility (New York Judiciary Law,) (McKinney 1975).

Yet, plaintiff's counsel paid no attention to this.

"Now, let us take up this whole story: The training the purpose for and the enjoyment that Mr. Rosen has in turning him loose. This series of incidents has constituted a section of my career. I have made it possible that any hour of the day or night, seven days a week, 365 days a year, if Vincent Bellows calls me, I go at once. And I will be at the station house before the police arrive." (T281).

By some mystical formula, the single alleged occurrence out of which this litigation had arisen was converted into a series of incidents which constituted a section of counsel's career. And the record is replete with such references to both plaintiff's past encounters...

"Look at the conduct of Vincent Bellows, the so-called intoxicated person. First, when the police come to him he is well informed. He says to them - he had a background of experience, always successful -- he says to them, 'I'll give you my name. My name is Vincent Bellows, and that is all I'm going to tell you.'" (T282).

and counsel's experience...

"I have seen too many cases. You tell a man, a policeman, something, and you will be arrested for what you told him regardless of whether you were guilty or not. And the best answer --" (T284) (Emphasis supplied)

and it was finally at this point that the Court reminded counsel of its prior warning, "Please do not get into general experience. We are sticking to the facts in this case." (T284) The court's utter failure to instruct the jury to disregard counsel's comments added to the prejudicial effects of counsel's comments.

The fact was and is that the instant case was an isolated and unique instance. And any attempt to place before the jury any contrary point of view, as appellee's counsel continued to do, stating:

".... Why in this case with all these arrests is there no criminal record? They had a right to ask. They know the rule. None. They know. Why all these arrests?" (T291).

was in contravention of the pronouncements of the trial court, the Federal Rules of Evidence and settled rules of law.

Still, appellee's counsel found the urge to submit more irrelevant and prejudicial matter to the jury.

"There are no more places we can go to stop these people. We have tried everything for 11 years. Was this an isolated instance?" (T301).

Though the Court chided appellee's counsel, it failed to consider the effect of these statements upon the jury (T301).

The effectiveness of the foregoing comments is attested to by the jury's return of a verdict in favor of the plaintiff awarding twelve thousand (\$12,000) dollars for compensatory damages and split five thousand (\$5,000) dollars in punitive damages.

In assessing the impact which appellee's counsel's repeated improprieties had on the jury, the fact that the award was reduced by the trial judge as grossly excessive cannot be disregarded. Koufakis, supra, at 901.

"Counsel's remarks were in reckless and purposeful disregard of all proprieties. They went far beyond the permissible limits of fair comment on what was before the jury and dealt altogether too much with matters and considerations outside the record which were obviously intended to prejudice the appellants in the eyes of the jury and seek their favor for the plaintiff." Koufakis, supra, at 904.

It is clear that plaintiff's counsel so persistently and continuously abused the freedom afforded counsel that

his presentation -- particularly in summation -- was based "on an appeal to passion and prejudice not warranted by the proof." and the prejudicial argument of counsel of the character here indulged in is sufficient cause for reversing the judgment.*

* Illustrative of the principle that the obligation of a District Court Judge to exercise the degree of control required to assure litigants a fair trial does not arise only when objections are raised by one of the litigants (Koufakis, supra) is this Court's recommendation that

"Since the trial judge is usually better able on the basis of his acquaintanceship with the evidence in each case to gauge the potentiality for abuse and to determine whether such references by counsel may have an unduly prejudicial effect upon the jury, he should remain free in his discretion either to prohibit trial counsel from giving the jury any opinion as to specific amounts that might be awarded for pain and suffering or to impose such reasonable limitations as he may prescribe. In the latter event, however, the court should certainly not limit itself to the frequently used 'boiler-plate' type of charge to the effect that 'arguments of counsel are not evidence' but should, either sua sponte or upon request, specifically advanced by counsel do not constitute evidence but merely represent argument which the jury is free to disregard in its deliberations." Mileski, supra, at 1173.

Indeed, the boiler-plate instruction was charged but no specific cautions were given the jury as the trial court failed to heed the advice of the court (T304; line 20).

Footnote continued...

Con't.

- * While the references by appellee's counsel in his summation to specific amounts of money which in his opinion the jury should award does not rise to the level of impropriety apparent elsewhere in the record, a serious problem is posed.

"A jury with little or no experience in such matters, rather than rely upon its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff's counsel, particularly if he conveys the impression (as frequently happens) that he speaks on the basis of extensive trial experience. Without benefit of any counter-figures from other sources -- defense counsel contesting liability rarely risks being drawn into a discussion of damages, since to do so might weaken his claim of any liability -- the jury has before it only one set of extravagantly high figures, which it may be tempted to treat as evidence rather than as mere argument...." Mileski v. Long Island Railroad Company, supra, at p. 1172.

Appellee's counsel placed "extravagantly" high figures with respect to both punitive and compensatory damages before the jury. It is apparent that the verdict awarding twelve thousand (\$12,000) dollars in compensatory damages and five thousand (\$5,000) dollars in punitive damages, clearly recognized by the District Court as excessive, was partially the result of the problem outlined above.

POINT IV

A NEW TRIAL SHOULD BE GRANTED
BECAUSE THE CHARGE OF THE COURT
TO THE JURY WAS MISLEADING,
INADEQUATE AND ERRONEOUS AND
DEPRIVED THE APPELLANTS OF A
FAIR TRIAL.

A.

1. The complaint of the appellee alleged, inter alia, that the appellants acted to deprive appellee of his constitutional and civil rights to be free from unlawful restraint (5a). The terms of 42 U.S.C. § 1983 make plain that as a prerequisite to recovery under that section a plaintiff must prove that the defendant has deprived him of a right secured by the Constitution and laws of the United States. Adickes v. Kress & Co., 398 U.S. 144, 150 (1969). Section 1983 does not come into play merely because federal law and state law is violated. Screws v. United States, 325 U.S. 91, 108 (1945).

There is no cause of action for "false arrest" under Section 1983 unless the arresting officer lacked probable cause. Street v. Surdyka, 492 F. 2d 368, 371 (4th Cir. 1974). The threshold inquiry must be whether sufficient facts and circumstances were present to warrant

a prudent man in believing that an individual had committed or was committing an offense. Gerstein v. Pugh, 420 U.S. 103, 111 (1975).

The Court's charge to the jury, not in accordance with the aforementioned constitutional standard, makes it clear that the initial inquiry was whether or not Section 140.10 of the New York State Criminal Procedure Law which provides:

".... a police officer may arrest a person for any offense which he has reasonable cause to believe that such person has committed in his presence."

had been violated (T309) and the specific questions drawn for the benefit of the jury compounded this error (T319, 36a).

"There is significant distinction between police action which is unlawful because violative of constitutional provisions and police action which merely fails to accord with statute, rule or some other non-constitutional mandate." Street, supra, at 371. And the jury's affirmative response to whether "the defendants had reasonable cause to believe that Vincent Bellows was publicly intoxicated in their

presence" does not mandate judgment for the appellee in a federal court. For even if the appellants had violated the New York Arrest Law, they cannot be held liable under § 1983 unless they also violated the Federal Constitutional Law governing a warrantless arrest. This question was never placed before the jury. To that extent a District Court exceeded its jurisdiction.

The District Court's reliance upon Meuller v. Powell, 203 F. 2d 797 (8th Cir. 1953) is misplaced (86a). There it was said and it cannot be disputed that "if the procedure prescribed by the state actually affords the character of due process contemplated by the federal constitution, and is followed, there is no denial of the right under the federal constitution." Id. at 800.* What is made most

* The Court's instructions that

"If the defendants did act within the limits of their lawful authority under State law, then the defendants could not have deprived the plaintiff of any liberty without due process law, since I instruct you that the New York State law, which is applicable in this case, does meet the requirements of the Federal Constitution. In other words, if they obeyed the State law, which is a constitutional law, they would not be responsible for the charge of taking him into custody." (T308, T309)

indicate that compliance with the statute condones appellants' actions, but the court failed to recognize that noncompliance was not a per se violation cognizable under Section 1983.

clear in Street, supra, at 372 is that "... the states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right." Although in many cases the same conduct will violate both state law and the federal constitution, not all violations of state law can rise to the level of a constitutional tort. And prejudicial results manifest themselves when as here the Court's charge to the jury fails to consider applicable federal law.

2. The Court committed additional fundamental error in charging the jury with respect to the initial inquiry as to the alleged deprivation of appellee's constitutional rights. To quote:

"1. As to Bellows' claim that improperly taken into custody, do you find from a preponderance of the credible evidence' -- and I should have used the word 'incredible' throughout my charge -- 'that the defendants had reasonable cause to believe that Vincent Bellows was publicly intoxicated in their presence on the evening of July 16, 1972, and that they acted in good faith in taking him into custody?'

"That question is to be answered yes or no." (T319).

The instruction reflected the court's determination that "in this case acting in good faith would be the linguistic or at least the conceptual equivalent of having reasonable cause to believe" (T260).

Such a pronouncement and the subsequent charge to the jury based thereon renders the decision of this Court in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339, 1348 (2d Cir. 1972) a nullity, where it was held that:

"....[T]o prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think, as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection."

In effectuating the Court's belief that the two separate and distinct concepts of law were equivalent, the determination by the jury that reasonable cause to believe was lacking, rendered the inquiry as to appellants' good faith defense moot. In the ordinary course of events, that very determination should have commenced an independent consideration of the appellants' position.

The fact that the issue of good faith was not considered independently deprived appellants of their rights under Pierson v. Ray, 386 U.S. 547 (1967), and the Court's error warrants reversal. See also Laverne v. Corning, 522 F. 2d 1144 (2d Cir. 1975). (A33).

3. The illegality of an arrest is necessarily dependent upon the elements of the underlying offense. Thus, in light of the appellants' position (T304) it was proper for the trial court to instruct the jury that Section 240.40 of the Penal Law of New York State provides:

"Public intoxication consists of a person appearing in a public place under the influence of alcohol, narcotics or other drugs to the degree that he may endanger himself or other persons, or annoy persons in the vicinity."

Clarifying the matter for the jury the Court stated -- "Put another way, they say they believed in good faith that he was publicly drunk at the time they took him into custody" (Emphasis added) (T304).^{*} To state that the offense of public intoxication is the equivalent of being publicly drunk is an interpretation abounding with error. When such error exists the appellate function is to insure that "...the instructions taken as a whole and viewed in the light of the evidence show no tendency to confuse or mislead the jury with respect to the principle of law applicable." Oliveras v. United States Lines Company, 318 F. 2d 890, 892 (2d Cir. 1963).

Immediately the Court further imbedded the misleading and erroneous direction in the minds of the jurors by summarizing:

"Mr. Bellows denies that he was drunk, ... and finally says that the Troopers could not have been acting in good faith since they released him within a few minutes after taking him into custody, and his condition had not changed at all during those few minutes." (T310, T311).

^{*} Actually Penal Law § 240.40 at that time spoke of "under the influence of alcohol...", not actually being "drunk."

The reference is to the appellee's erroneous position that the only inquiry relevant to the legality of the arrest and subsequent release was Vincent Bellow's level of intoxication (T282, T287, T288), and the Court took no steps to instruct the jury otherwise.

Appellants did not rely upon the appellee's level of intoxication to condone their actions pursuant to Section 140.20 of the Criminal Procedure Law of the State of New York or to establish the defense of good faith, but relied upon the absence of any present danger to the appellee or other persons. They never had a change of mind as to plaintiff's intoxicated condition.

The Court's over-simplification, in failing to instruct the jury with respect to the other necessary element of the offense, placed before the jury a set of erroneous and misleading instructions. Thereby the appellants were prejudiced and deprived of a fair trial.

B.

1. Section 1983 does not provide a remedy for common law torts. In Paul v. Davis, ___ U.S. ___, 47 L. Ed. 2d 405 (1976) the Supreme Court of the United States has noted the "constitutional shoals" that confront any attempt

to derive from congressional civil rights statutes, a body of general federal tort law. Griffin v. Breckenridge, 403 U.S. 88, 101 (1971).

As to the alleged application of physical force, the Court charged that the question was simply whether the appellants applied force (T320).

This was an instruction on tortious battery. The constitutional protection available under Section 1983 is "nowhere nearly so extensive as that afforded by the common law action for battery, which makes actionable any intentional and unpermitted contact with plaintiff's person, and although the least touching of another in anger is a battery, it is not a violation of a constitutional right actionable under Section 1983." Johnson v. Glick, 481 F. 2d 1028, 1033 (2d Cir. 1973) cert. denied 414 U.S. 1033. The question cannot alone be whether the conduct was tortious. Yet, there is nothing in the record to indicate it was otherwise.

"The elementary requirements of a use of force rule under § 1983 must be that it neither permits 'brutal police conduct' nor allows such 'application of undue force'

that the police conduct 'shocks the conscience' [citations omitted]." Jones v. Marshall, 528 F. 2d 132, 139 (2d Cir. 1975) and the rule that the "use of excessive force by police officers in effecting an arrest is a well recognized ground for liability under 42 U.S.C. § 1983" falls well within those parameters. Clark v. Ziedonis, 513 F. 79 (7th Cir. 1975). But it does not go beyond and therein lies the prejudice herein.

The complete failure of the trial court to recognize any of the factors that distinguish tortious battery from rights protected under 42 U.S.C. § 1983, and its subsequent failure to charge the jury as to the proper law applicable was erroneous.

The complete inadequacy of the charge as to the law on a violation of civil rights, leaving the jury free to find liability on simple state torts, deprived defendants of a fair trial and warrants setting aside the verdict. As said in Callen v. Pennsylvania R. Co., 162 F. 2d 832, 835 (3d Cir. 1947), affd. on other gds. 332 U.S. 625 (1948), "the failure [by appellant] to suggest such point does not excuse the omission from the charge of the laws of that phase of the case which should have been charged of the Court's own motion."

Regardless of objection, a court's error in instructing on a material issue should be the basis for a new trial when it is apparent, as here, a miscarriage of justice may otherwise occur. 6A Moore's, Federal Practice, ¶ 59.08[2] (59-106, 107). It should be obvious that the grossly excessive size of the verdict, totally unsupported by any fact of damages, demonstrates that a miscarriage has occurred.

2. "A litigant is entitled to have a trial judge advise the jury of his claims and theories of law if supported by the evidence and brought to the attention of the court." Oliveras, supra, at 892. Despite appellants' request (A29) the Court refused to instruct the jury that the appellants had the lawful authority to use such physical force as may have been necessary to effectuate an arrest (T257) concluding that

"Since the defendants deny that these events occurred, you need not concern yourself whether any possible use of force was reasonable or exerted in good faith. The defendants themselves make no such claim. They claim, rather, that force simply was not exerted." (T313).

Yet, the Court contradicted itself upon further consideration stating

"The defendants here have said -- I do not like to use the word 'admitted' or 'not denied' -- that they did take Mr. Bellows by his arm to the car. They have asserted that that was assisting him to the car. Literally speaking, that is the use of physical force...." (T317).

This, in itself, evidences an issue of fact for the consideration of the jury. In light of this the Court's failure to charge the jury as requested constituted an erroneous invasion of the jury's province and deprived appellants of a fair trial.

3. The Court was again in fundamental error through over-simplification as to burden of proof concluding:

"....that if you believe the defendants' version of the story in that regard, you should find in their favor. If you believe Mr. Bellows' version, you should find in his." (T317).

The clear effect of such language is to mislead and confuse. Upon deliberation the jury was free to decide that the appellants had not proved their version of the

story by a fair preponderance of the credible evidence and find in the appellee's favor. And there is no guarantee that they did not shift the burden of proof to the appellants. Such an expression is certain to be more meaningful to the individual juror than an instruction as to the "fair preponderance of the credible evidence" (T316).

"It has long been generally recognized that it is reversible error to place the burden of proof on the wrong party or to place an unwarranted burden of proof on one party [Citations omitted]" Voigt v. Chicago and Northwestern Railway Company, 380 F. 2d 1000, 1004 (8th Cir. 1967). The Courts carelessly chosen and spoken words render the verdict suspect as attributable to a misplaced burden of proof and the judgment of the Court below should be reversed.

POINT V

THE COMPENSATORY DAMAGES EVEN AS
REDUCED WERE GROSSLY EXCESSIVE.
A PUNITIVE AWARD WAS NOT JUSTIFIED
AND ALSO WAS EXCESSIVE.

While we believe that the totality of the trial errors in the prior points warrants the granting of a new trial, the reduced award of \$4,000 as compensatory damages and the unreduced award of \$5,000 as punitive damages were grossly excessive. Certainly, where the District Court concedes

physical and emotional harm are "nominal" (Memorandum, 90a), \$4,000 compensatory damages are totally out of proportion to any possible damages herein, even viewed in the most favorable light to plaintiff. The damages were not compensation for any deprivation of constitutional rights and numerous cases under 42 U.S.C. § 1983 demonstrate the excessive nature of the judgment.

A. The Excessive Compensatory Damages

Recently in Manfredonia v. Barry, 401 F. Supp. 762 (E.D.N.Y. 1975), Judge Neaher awarded \$3,500 to each plaintiff where the plaintiffs suffered mental and emotional distress and were subject to public notoriety and embarrassment as a result of police action. There were the consequences of fingerprinting, photographing, an uncomfortable overnight stay in jail, continued court proceeding when the police refused to dismiss the charges, arrest records stigmatizing both plaintiffs with an odious offense even though the charge was later dismissed, and extensive newspaper and media notoriety. 401 F. Supp., at 771. Yet for all this a compensatory award of \$3,500 was given. (An award of \$500 punitive damages was allowed, id. 773). Of course, absolutely none of the above is present in the instant action.

At n. 4, Manfredonia, at 771 lists numerous civil rights actions with damages. (See also 770). While familiar elements of damage (loss of earnings, out-of pocket loss, physical injury) are not essential to award of damages here, reasonable compensation is not unlimited. Obviously the familiar elements support a larger award, but their absence as here, warrants a further substantial reduction of the judgment herein.

(1) The only case even approaching the judgment here is Gaston v. Gibson, 328 F. Supp. 3 (E.D. Tenn. 1969). There the award was \$10,000 compensatory damages and \$30,000 punitive. The conduct of the police was characterized as "shocking". Plaintiff had medical bills of \$736.60 and suffered from a lasting head injury due to brutal police abuse. A mere reading of the opinion shows that the award was based on conduct infinitely more "shocking" than any herein.

(2) By way of comparison, recently in the same District as below, in the case of Vargas v. Correa, 416 F. Supp. 266 (S.D.N.Y., 1976), an award of \$250 compensatory and \$300 punitive was allowed. Therein the defendant prison

guard provoked plaintiff. The guard, the defendant, punched plaintiff in such a severe manner so as to throw him against the bars of the prison and onto the floor. After plaintiff stood up, there was another attack on him. Plaintiff testified his neck and hand were stiff. However, there was no medical evidence. Obviously, if two vicious blows entitle one to \$250 damages, obviously an award of \$4,000 is grossly excessive. Even the punitive damages therein were a small fraction of \$5,000. Basic to the award of \$300 punitive damages was a finding of malicious and sadistic application of force for the very purpose of causing harm. (Opn. p. 7). Yet, in the instant case the "force" caused no harm and there was no evidence of malice or sadism.

In other cases:

(3) Magnett v. Pelletier, 360 F. Supp. 902 (D. Mass. 1973); \$500 damages for police unlawful entry in apartment.

(4) Farber v. Rizzo, 363 F. Supp. 386 (E.D. Pa. 1973); \$750 and \$500 compensatory

damages for unlawful arrest and detention for 2 to 9 hours.

(5) Tatum v. Morton, 386 F. Supp. 1308 (D.D.C. 1974); \$100 damages for unlawful arrest and 3 to 4 hours jail detention.

(6) In the state courts, similar actions fail to sustain excessive jury awards. Where the plaintiff has sustained only "mental distress" and "humiliation", with one hour and fifteen minutes detention, the State Supreme Court in Davis v. Town of Eastchester, (Westchester Co.), New York Law Journal, December 30, 1975, p. 12, c. 4, reduced a jury verdict from \$5,000 to \$2,000. Noted was that "(t)he jury verdict and the summation of the attorney indicate that the verdict was punitive as opposed to compensatory".

It should be abundantly clear that without any physical injury and basic absence of emotional injury plaintiff herein was entitled at best to nominal damages. Failure to charge on nominal damages, as requested, was error.

At worst, compensatory damages of a few hundred dollars would be adequate to compensate him for the entire incident. Plaintiff was gone for 10 minutes at most and never was subjected to any legal proceeding. Any "force" must have been de minimis as it caused no physical injury.

Therefore, the reduced of compensatory damages in the amount of \$4,000 still did not eliminate the prejudice and passion against the defendants. The compensatory award is still totally punitive in basis and effect. The introduction of testimony by plaintiff on his prior arrests by the State Police and acquittals -- and quite improperly -- obviously inflamed the jury and severely prejudiced the defendants who were in no way involved.

Why they should compensate plaintiff for an alleged 10 years of State Police "harassment" is beyond the scope of the action. Even \$4,000 was still grossly excessive. There can be no doubt defendants are being "punished" to ten years history and beyond. This is what plaintiff wanted. He has now been compensated for irrelevant acts of other police officers.

The District Court in reducing the compensatory verdict was aware of the grossly excessive nature thereof but it should be emphasized that there was absolutely no medical evidence of any physical injury. While the plaintiff

said he went to a doctor, the doctor did not testify for him and no medical bills were introduced. Indeed, the plaintiff's counsel minimized this aspect by stating the bill was for \$5. (T23, T260). Thus, there were no physical damages. Further, the force was not of constitutional dimensions; Johnson v. Glick, supra.

As to "emotional" injury, we are faced with the de minimis detention of 5-10 minutes in a police car. In that time plaintiff was simply sitting in the back seat unrestrained. After this time he was released without even having to face any further charges. This leaves one with the question whether 5-10 minutes in the back seat of a police car warrants judgment of \$4,000 in compensatory damages (plus \$5,000 in punitive damages.)*

While damages are in the province of the jury, and the District Court exercised this discretion to reduce same, the continued excessiveness has been demonstrated by comparing the award in the instant case with similar cases previously cited. In all those cases examined there were aggravating circumstances which are totally absent in the

* Of course, part of the \$4,000 awarded for "force" during the course of the arrest and the one blow, but without any physical injury, it is impossible to see how this can stand.

instant case and yet, in all (with one exception) the judgments were lower, and substantially so upon examination.

B. The Punitive Damages Were Not Proper
And, In Any Event, Grossly Excessive

In allowing punitive damages to go to the jury, the District Court was acting over the vigorous objection of defendants. (T244). Yet, even here the District Court failed to properly instruct the jury. While the trial court allowed punitive damage (T315) on the basis of a malicious, wanton or oppressive act, and purported to define those terms, we submit that the instructions allowed punitive damages on the same basis of the compensatory damages.

The facts of the case simply do not warrant any award of punitive damages. If the circumstances of this action were not motivated by malice, and no elements of wantonness, or overbearing as any application of force was momentary and of insufficient quality to inflict even the slightest sign of physical injury, and obviously no psychological injury, the punitive damages were not set with a "calm mind" and "sound discretion." As the compensatory damages had no rational relation to any conceivable damages, but rather were punitive, the punitive damages were set in a manner which cannot be upheld as a matter of law. Once

again the jury was acting as a result of the introduction of prejudicial testimony (of prior arrests) of no probative force.* It acted to punish the State Police in general though the defendants who were innocent of any connection with the prior incidents. In the interests of justice, no punitive damages should be allowed here because while the defendants may have made a mistake, they never were shown in any testimony to be malicious, wanton or overbearing. Rather, compassion was shown to plaintiff by voluntarily releasing him after 5-10 minutes in the car. For this act of kindness to be rewarded by punitive damages of \$5,000 is a miscarriage of justice.

The law in this Circuit would certainly require that defendants bear some kind of animus to plaintiff as to be some kind of pattern of behavior.** Sostre v. McGinnis, 442 F. 2d 178, 205 (2d Cir. 1971), cert. denied 404 U.S. 1049, 405 U.S. 978, which reversed an award of punitive damages. The deterrent impact of a punitive award would be of minimal use. See Green v. Wolf Corp., 406 F. 2d 291, 303 (2d Cir. 1968), cert. denied 395 U.S. 977.

* Plaintiff and his attorney made a great effort to "show" that plaintiff does not cry. I.e., police detention does not cause him any distress.

** There was no evidence of any prior or subsequent "misconduct" by any of defendants.

The punitive award was obviously related to the grossly excessive compensatory award. Yet, the District Court failed to reduce the punitive damages. Besides a lack of evidence to sustain the punitive award, as the appellants voluntarily released plaintiff after 5-10 minutes without even taking him to the police station, there was no malice. If words have any meaning, this record hardly sustains any award of punitive nature.

Still the punitive award, undisturbed, was grossly excessive. The appellants are State Police Officers, and obtained no monetary benefit from their actions. The evidence demonstrates that appellants never had any prior contact with plaintiff and did not even know him. The damages are not necessary as a deterrent for there was not showing appellants had to be deterred. In such circumstances this Court has drastically reduced punitive damages. Buckley v. Littell, 539 F. 2d 882, 897 (2d Cir. 1976), cert. denied, ___ U.S. ___, 45 L.W. 3489 (1977) i.e., reduction of punitive damages from \$7,500 to \$1,000 in a libel action.

In all probability, regardless of the status of the District Court's errors, the judgment should be further reduced in a substantial manner.

Viewed properly the instant action should have been in a Small Claims Court. The damages, viewed in any light, did not approach, even fractionally, the judgment.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT
BELOW SHOULD BE REVERSED, THE COM-
PLAINT DISMISSED OR THE MATTER
REMANDED FOR A NEW TRIAL.

Dated: New York, New York
January 25, 1977

Respectfully submitted,

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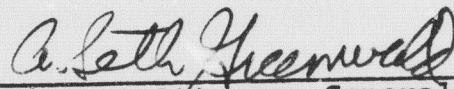
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

 JEANETTE MARCELINA , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Defendants-
 Appellants
herein. On the 25th day of January , 1977 , s he served
the annexed upon the following named person :

Rosen & Rosen, Esqs.
265 Broadway
P.O. Box 348
Minticello, New York 12701

Attorney s in the within entitled appeal by depositing
three (3)
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorneys at the
address within the State designated by them for that
purpose.

Sworn to before me this
25th day of January , 1977


Assistant Attorney General
of the State of New York

